IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.08.2007

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THE HON'BLE MR.JUSTICE M.JAICHANDREN

Writ Petition No.20267 of 2007

M/s. Auto Wing Industries,
Represented by its Proprietrix, Mrs. A.Muthammal,
No. Godown-'D' 1st Cross Road,
Ambattur Industrial Estate,
Chennai - 600 058 .. Petitioner

-Vs.-

1. The Commissioner of Central Excise,
Office of the Commissioner of Central Excise,
Chennai-II Commissionerate,
No.692, MHU Complex, Anna Salai,
Nandanam, Chennai - 600 035

2. The Deputy Commissioner of Central Excise,
Chennai IV Division, Chennai-II Commissionerate,
R-40, A-1, TNHB Complex,
Mogappair, Chennai - 600 037 .. Respondents

Prayer:- Writ petition filed under Article 226 of the Constitution of India for the issuance of a writ of certiorarified mandamus to call for the records comprised in C No.IV/16/54/2004-MISC dated 29.03.2005 on the file of the second respondent herein and quash the same and consequently direct the second respondent herein to consider the representation of the petitioner dated 23.03.2005 after affording an opportunity of hearing to the petitioner and pass orders in accordance with law.

For Petitioner : Mr. G.RM.Palaniappan
For Respondents : Mr. P.Wilson, Asst. Solicitor General.

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O R D E R

The writ petition has been filed for the issuance of a writ of certiorarified mandamus to call for the records comprised in C.No.IV/16/54/2004 MISC, dated 29.03.2005, on the file of the second respondent herein and quash the same and consequently direct the second respondent herein to consider the representation of the

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petitioner, dated 23.03.2005, after affording an opportunity of hearing to the petitioner and to pass orders in accordance with law.

2. The brief facts of the case, as stated by the petitioner, are as follows:

The petitioner-company is a manufacturer of cylinder liners for all automobile vehicles and it was engaged in the manufacture of excisable goods at their factory situated at shed No.172, Sidco Industrial Estate, Ambattur, Chennai - 600 058. Due to operational inconvenience and insufficient space, the petitioner-company has shifted their factory to Godown-'D', 1st Cross Road, Ambattur Industrial Estate, Chennai - 600 058. Before shifting the factory, the petitioner-company intimated to the second respondent, by way of a letter, dated 01.09.2004, about the proposal to shift the factory and that it has been registered with the Central Excise Department, Ambattur Range III. At the time of the shifting of the petitioner-company, it had unutilized credit balance of Rs.8,64,348.53 in CENVAT credit account. The petitioner-company gave a letter, dated 08.11.2004, to the second respondent requesting to transfer the CENVAT credit to its present address so that the petitioner-company can utilise the same in future for payment of duty and the petitioner-company had further stated that, on 08.11.2005, the petitioner-company had sent a letter mentioning that they have no stock of inputs at the time of shifting of the factory and therefore, transfer of capital goods and inputs does not arise.

3. By an impugned order, dated C.No.IV/16/54/2004 MISC, dated 29.03.2005, the second respondent had sent a communication to the petitioner-company stating as follows:-

> "Please refer to your letter dated 23.3.2005 asking the transfer of Cenvat Credit of RS 8,64,348.53 to your Unit at Godown D, 1ST Cross Street, Ambattur Industrial Estate,Chennai 600 058
> It is observed, in this connection that you have already removed/transferred Capital Goods and the Inputs on payment of duty. After the payment of duty, it appears that you have RS 8,64,348.53 as Credit unutilized.
> As per the Provisions of Rule 10 (3) of Cenvat Credit Rules, 2004, the transfer of credit is admissible only along with the transfer of goods. In this case, as there is no proposal to remove the Inputs/Capital Goods and as you have no such goods, at your premises, your request to transfer the Credit amount of RS 8,64,348.53 is not admissible"

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4. The main contention of the learned counsel for the petitioner-company is that the petitioner-company had not been given sufficient opportunity to represent the matter and the impugned communication, dated 29.03.2005, is devoid of particulars. The learned counsel had submitted that the petitioner-company had written several letters to the respondents to grant an opportunity of hearing to represent the matter. However, no such opportunity had been granted. Therefore, the petitioner-company has approached this Court by way of filing the present writ petition.

5. Mr. P.Wilson, learned Assistant Solicitor General, appearing on behalf of the respondents had pointed out that the impugned communication, dated 29.03.2005, is in accordance with Rule 10(3) of the CENVAT Credit Rules, 2004, which reads as follows:-

> "Rule 10. Transfer of CENVAT Credit - (1) If a manufacturer of the final products shifts his factory to another site or the factory is transferred on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the factory to a joint venture with the specific provision for transfer of liabilities of such factory, then, the manufacturer shall be allowed to transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated factory.
>
> (2) If a provider of output service shifts or transfers his business on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the business to a joint venture with the specific provision for transfer of liabilities of such business, then, the provider of output service shall be allowed to transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated business.
>
> (3) The transfer of the CENVAT credit under sub-rules (1) and (2) shall be allowed only if the stock of inputs as such or in process, or the capital goods is also transferred along with the factory or business premises to the new site or ownership and the inputs, or capital goods, on which credit has been availed of are duly accounted for to the satisfaction of the Deputy Commissioner of Central Excise or, as the case may be, the Assistant Commissioner of Central Excise"

placing reliance on the above referred rule, the learned Assistant Solicitor General had submitted that CENVAT credit shall be allowed only if the stock of inputs as such or in process, or the capital

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goods is also transferred along with the factory or business premises to the new site and since the petitioner-company had not shifted the capital goods along with the shifting the factory premises, the CENVAT credit will not be available to the petitioner-company. It is also further stated by the learned Assistant Solicitor General that there is an appeal provision under Section 35 of the Central Excise Act, 1944, and that the petitioner-company can avail of such remedy, if permissible under law.

6. At this stage of the hearing the learned counsel for the petitioner-company had pointed out that a communication, dated 12.04.2007, in C.No.IV/16/10/2006 Tech has been sent by the Additional Commissioner (Tech) stating that if the petitioner-company is aggrieved by the decision of the second respondent, it can seek remedy from the Appellate Authority concerned.

7. Considering the submissions made by the learned counsels on either side and also considering the facts and circumstances of the case the following order is passed:-

> It is open to the petitioner-company to seek the appeal remedy, by way of filing an appeal before the authority concerned, in accordance with law, in view of the communication, dated 12.04.2007, made in C.No.IV/16/10/2006 Tech, within a period of four (4) weeks from the date of receipt of a copy of this order. On such appeal being filed by the petitioner-company, the concerned Authority shall pass appropriate orders on merits and in accordance with law, after giving sufficient opportunity of hearing to the petitioner-company herein.

8. With the above directions, the writ petition is disposed of. No costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To

1. The Commissioner of Central Excise,
   Office of the Commissioner of Central Excise,
   Chennai-II Commissionerate,
   No.692, MHU Complex, Anna Salai,
   Nandanam, Chennai - 600 035

2. The Deputy Commissioner of Central Excise,
   Chennai IV Division, Chennai-II Commissionerate,
   R-40, A-1, TNHB Complex,
   Mogappair, Chennai - 600 037

1 cc to GRM. Palaniappan, Advocate, Sr. 52974
1 cc to Mr.P. Wilson, Asst. Solicitor General of India, Sr. 52590

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